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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IN THE MATTER OF R_____ M. J_____
Appellant

On Appeal from the Supreme Court of Missouri

APPELLANT'S REPLY BRIEF

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FOREWORD

We recognize the limited purpose of a reply brief. This one is longer than most for two reasons, as follows: (1) the court below did not attempt to justify the challenged rules by constitutional standards, but simply announced a conclusion, so that, in appellees' brief, we are presented with the first essay at justification; and (2) several decisions involving constitutional challenge to legal advertising have been handed down since our brief was written.

ARGUMENT

I.

A Rule Listing The Only Permissible Items Of Advertising, And Forbidding All Others, Is Constitutionally Infirm.

The appellees are distinctly helpful in defining the issues by making it clear that the rule they seek to defend, as supplemented by the Advisory Committee Addendum, "rigidly says that you may do certain things and no other," (p. 14, discussing DR 2-101-(B)), and that it "sets out a list of areas of practice and routine legal services which a lawyer may advertise to the eclusion of all others." (p. 9.) If the lawyer advertises anything at all outside of the prescribed categories he is subject to disciplinary action and possible loss of his license.

We are told in justification that the eminent lawyers who drafted the rule, the Judges of the Supreme Court of Missouri, and the Advisory Committee have determined that the permitted items are "certainly adequate to advise the public of what is available and by whom in all common fields of practice." (Ibid., p. 8). The draftsmen began with the list of 25 items included by the American Bar Association in its Proposal A,[1] and then cut this list to 9, (later increased by the court below to 10), being of the opinion that the listed items were adequate to inform the public "concerning the availability and price of routine legal services of lawyers." (Ibid, p. 3.) Appellees express the opinion that the rule "...will not unduly limit the information flowing to the public for its benefit." (Ibid., p. 9.)

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[1] For the text of Proposal A see Lori B. Andrews, *Birth of a Salesman: Lawyer Advertising and Solicitation,* (A.B.A. Press, Rev. Ed, pp. 97ff.) In Bishop v. Committee on Professional Ethics, F. Supp. (U.S.D.C.S.D. Iowa, Civil #81-47-D, August 20, 1981), the court held a Plan-A type rule invalid to the extent that it precluded a lawyer from listing his race, which the court found was a factual matter which might be of interest to members of the public.

This rule institutes a concept of regulation wholly at variance with the First Amendment. It has nearly all of the vices of an absolute prohibition, such as was condemned in *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977.) That a partial prohibition is no more valid than a total prohibition is shown by *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U.S. 748 (1976), which involved a prohibition only on the advertising of prices of prescription drugs, and with *Central Hudson Gas and Electric Company* v. *New York Public Service Commission,* 447 U.S. 557 (1980), in which the challenged regulation prohibited only that advertising promoting the consumption of electricity.[2]

There is, furthermore, no precedent for a scheme of regulation of protected sppech in which the regulatory authorities, rather than the speaker, choose the language which may be used. The Missouri rule is truly a rule of censorship and prior restraint.

II.

The Regulatory Authorities Have The Burden Of Justifying Restrictions On Lawyers' Truthful And Factual Advertising.

The appellees at page 7 suggest that there is a legal rule to the effect that "this Court will subject rules restricting the speech of lawyers to a *low level of judicial scrutiny.*" (Emphasis supplied,) citing *Ohralik* v. *Ohio,* 436 U.S. 447, 457 (1978), in support of the proposition. The italicized phrase is repeated on pages 3, 9, and 14 of appellees' brief, with the last two insertions in quotation marks as though to suggest that the phrase emanated from the opinions of this Court.

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[2] Appellees incorrectly state (page 6) that the question in Central Hudson was "whether the State could completely suppress all advertising."

The italicized phrase is actually a distortion of the language appearing at page 457 of *Ohralik*, in which it is said that if there is a "business transaction in which speech is an essential but subordinate component," this circumstance "*lowers* the level of appropriate judicial scrutiny." (Emphasis supplied.) Not only is the language of the opinion distorted; it is manifestly taken out of context. This case does not involve a business transaction between two parties as Ohralik did.

This case is distinguished from *Ohralik* in that the in-person solicitation there involved exerted pressure and demanded an "immediate response without providing an opportunity for comparison or reflection." 436 U.S. at 457. As such, although presumptively protected, the speech was subject to prophylactic regulation to further the important state interest of preventing "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct,' " in "circumstances likely to result in the adverse consequences the State seeks to avert." (Id. pp. 462, 464.)

Appellant's speech here, like that in *Bates* and unlike that in *Ohralik*, was "pure" commercial speech, in that it was not in any sense coercive. No pressure was exerted; no immediate response was demanded; ample time existed to measure appellant's speech against speech from other sources. Accordingly it was entitled to the protection afforded in *Bates* and *Central Hudson*. *Central Hudson*, in particular, holds that "limitations on expression must be designed carefully to achieve the state's goal," (564), and must be "narrowly drawn."[1] The burden is on the would-be regulator to demonstrate that "its interest cannot be protected adequately by more limited regulation of ap-

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[1] In re Primus, 436 U.S. 412, 438 (1978); Central Hudson Gas and Electric Corporation v. New York Public Service Commission, 447 U.S. 557, 560 (1980). The appellees engage in a play on words in their Summary of the Argument, p. 3, in describing the Missouri rule as "narrowly drawn." Restrictive the rule is, but narrowly drawn, in the Primus-Central Hudson sense, it is not.

pellant's commercial expression." Neither the court below nor the appellees here make the slightest attempt to meet this burden.

III.

Missouri's Regulations Cannot Be Justified Simply Because They Might Make The Task Of Regulation Of Lawyer Advertising Easier.

Appellees try to justify the Missouri rules by arguing that a highly restrictive rule, by its very restrictiveness, will operate to prevent misleading advertising. (pp. 9, 11) and will ease the burdens of administration and enforcement. Both of these arguments were emphatically rejected in *Bates*, when offered in justification of a rule of total prohibition. These same arguments are no more appropriate when offered in support of a partial prohibition.

The state may regulate freedom of expression by means of a prophylactic rule only when the evil sought to be deterred is "likely to result" from the proscribed speech. *Ohralik*, p. 464. The dangers Bates seeks to avoid, however, are not "likely to result" from the appellant's truthful, non-coercive, written speech. *Bates*, so holds.

The complaints in the Texas amicus brief are inappropriate, for Texas has not availed itself of available means for regulation by amending its rules in the light of *Bates*. It has simply suspended them insofar as they conflict.[4] There is not a single report of a Texas disciplinary action for advertising since *Bates*. The appended advertisements contain much factual material which is undoubtedly protected. The authors seem concerned lest debtors be alerted to statutes existing for their benefit. The objectionable features detailed on page 5 could be regulated by appropriately narrowly drawn rules, which have not even been tried.

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[4] Andrews, *op. cit.*, p. 146, f.n. 6.

IV.

The First Amendment Protection For Lawyer Advertising Is Not Confined To The Advertising Of Routine Legal Services.

In appellees' argument that *Bates* sanctioned only the advertising of "routine legal services," (pp. 7, 8, 9), the partial quotation on page 7 is taken out of context. (*Bates,* l.c. 372). The Court at that point was talking about advertisement of the charges for legal services. This issue was one of the most troublesome in Bates and one on which the members of the Court were sharply divided. Nothing in the *Bates* opinion provides any support for the proposition that lawyers may be prohibited from advertising legal services which are other than routine. The advertising which *Bates* protects is advertising which is truthful and not misleading and which might be helpful to the consuming public.

The Missouri rule, furthermore, does not confine permissible advertising to that which is routine. The Addendum expressly permits the advertising of practice in such non-routine areas as Antitrust Law, Eminent Domain Law, Financial Institution Law, Labor Law, and Public Utility Law.[3] Not a word is offered in justification of the inclusion of these areas while the appellant is forbidden to list areas in which he holds himself out as available. The First Amendment does not countenance a selective regulation of freedom of expression, in which some expres-

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[3] A recent decision of the United States District Court for Rhode Island, Lovett and Linder, Ltd. v. Carter, F. Supp. , 50 U.S. Law Week 2193, September 8, 1981, holds that a state may forbid a "laundry list" of areas of law practiced, even though there is a disclaimer. We submit that this holding is inconsistent with Central Hudson, in that a lawyer has the constitutional right to advertise available services and the state's purpose of preventing deception can be accomplished by less restrictive means. Cf. Durham v. Brock, 498 F. Supp. 213, (M.D. Tenn., 1980), The Rhode Island case does not help the appellees because Missouri imposes no limit on the number of areas of law that may be listed, so long as the approved phraseology is used, and does not require training or experience in any area listed.

sion is permitted while other expression of the same quality is prohibited. See *Metromedia, Inc.* v. *City of San Diego,* U.S. , 101 S. Ct. 2882 (1981).

V.

Missouri Provides No Procedure For Application To The Advisory Committee For Permission To List A Field Or Area Of Law Which Is Not On The Approved List.

We were surprised by the assertion at page 8 of Appellees' brief that "if the list of fields or areas of practice is incomplete, the advisory committee can be petitioned for an addition," because the record in this case shows that, on December 16, 1977, the Appellant expressly requested the Advisory Committee to approve his display advertisement containing areas of practice which were not on the approved list. (A-14, Stip., Exh. 6). The letter in response said curtly that "the rule requires only the use of the specific phraseology adopted by the Advisory Committee." (A-15, Stip, Exh. 7.) We called this to the attention of appellees' counsel, who now authorizes us to state that our reading of the record is correct and that no claim that the appellant failed to exhaust any state remedies is being advanced.

It is a matter of public record, furthermore, that another Missouri lawyer applied to the Advisory Committee for permission to say that he practiced "Social Security Disability Law," Neither this field nor anything close to it is listed in the Addendum. (Appt. Bf., p. 4.) The Advisory Committee denied the request, summarily and without explanation, and he filed a declaratory judgment action in a state court. The Advisory Committee moved to dismiss the action on the ground that there was no "actual controversy," and the court sustained the motion on the basis that the plaintiff had not actually sought to place an advertisement and had not been cited by the Advisory Committee.[4]

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[4] Gann v. Missouri Bar Administration Advisory Committee, #CV78-3779, Circuit Court of Jackson County, Missouri, unreported opinion of Bondurant, J., February 22, 1979.

The rules of the Supreme Court of Missouri establish no procedure for application to the Advisory Committee for permission to list a field or area of law which is not on the Committee's list,[7] and the Committee itself has established no such procedure. The Committee seems intent on avoiding a test by a lawyer unless the lawyer is willing to put his license on the line in a disciplinary action. This approach chills freedom of expression and necessarily deprives the public of potentially valuable information about available legal services.

The Committee has provided absolutely no explanation, either at the time its Addendum was promulgated or in the record of this case, as to why it listed certain fields and excluded others, or why it chose certain descriptive language to the exclusion of other possible language. We would admit the possibility that a state which certified legal specialists (which Missouri does not) might require that the specialities be described in the exact language of the certificate.[8] That is not the present case. In a rule in the Missouri format there is absolutely no justification for denying a lawyer the opportunity to list a field of law in which he holds himself out as available, or for requiring the lawyer to use certain descriptive language rather than other language which one might consider more informative or more meaningful.

VI.

Appellant Is Not Charged With False Or Misleading Advertising.

The appellees' description of the case of *Zimmerman* v. *Office of Grievance Committee,* 438 NYS 2d. 400, (N.Y. App.

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[7] Missouri has no counterpart of DR 2-101(C) of ABA Proposal A. See Andrews, *op. cit.*, p. 104.

[8] We would not concede that the lawyer could not add explanatory material, such as "admiralty has to do with the sea, ships and sailors."

Div., 1981) is not accurate. Further consideration of that case is helpful because it demonstrates a proper approach to the regulation of lawyers' advertisements. A telephone company established a section of "Lawyers Grouped by Practice" in the Yellow Pages. Any lawyer willing to pay the price could list his name under any or all of the 25 separate headings, and the lawyer in question did just that. The lawyer also listed himself under his given name of Aaron rather than under his surname, in order to move himself up in the alphabetical ladder. He was expressly charged with "false, deceptive or misleading" advertising in violation of New York's DR 2-101-(A), which is essentially the same as the Missouri rule (Appt. Bf., p. 2). The court found: (1) that the listing of a name under a particular heading constituted a holding out of competence and experience in that area, and (2) that, inasmuch as Zimmerman, with about three years of practice, admitted that he had no experience in some of the areas listed, his advertisement was misleading. The case, then, involved an express finding of fact which was not made in the case at bar, and could not be made under the charges and evidence (See Point VII, infra). We see no reason to speculate as to the correctness of the New York court's factual finding because this case is totally different, substantively and procedurally, from that one.

Nor do we have to speculate as to the validity of a restriction on the number of areas a lawyer may list, or on a requirement of training or experience in the areas listed, since no rule involving such restrictions as before the Court. Missouri does not limit the number of areas a lawyer may list, so long as the Advisory Committee's language is used. It relies on the disclaimer rather than on any requirement of training or experience in the listed areas.[9]

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[9] Note 5, *supra*.

VII.

A Blanket Prohibition May Not Be Used To Justify Regulation Of A Particular Item.

Appellees' suggestion that the perfectly true and totally factual statement that the appellant is "admitted to practice before the United States Supreme Court" may amount to "puffing" or may be a "self-laudatory statement" interjects an issue which this Court does not have to reach. The item is of a kind which is regularly publicized by lawyers.[10] It is no more self-laudatory, and much more germane to the furnishing of legal services, than is other information permitted by the Missouri rule, such as the listing of colleges and degrees. The rule, for example, allows a lawyer to say that he had a Ph. D. in Philosophy from the Sorbonne, if such is the fact. There is, furthermore, no express prohibition of the mention of this Court, and no indication that the case would be in a different posture if admission to this Court had not been stated in the ad. The rule forbids the listing of any courts (since it does not expressly permit this information in advertisements.) The appellees have the burden of justifying this prohibition, and have offered only the suggestion that the authorities did not think that the information about courts of admission would be helpful to potential clients.[11]

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[10] Over 100 St. Lawyers advertise that they are members of the bar of this Court in the biographical section of the 1981 Martindale Hubbell Legal Direction, in which advertising space may be purchased. The publication is freely available in public liabraries.

[11] We submit that the list on page 10 of appellees' brief, of states which assertedly forbid lawyers to list the courts in which they are admitted to practice, is not correct. Appellees advise us that they compiled this list from copies of the state rules filed in the court below, and that no effort has been made to bring the data up to date. Verification is impossible for lack of citation, but we suspect that many of the rules so filed were pre-Bates rules. The most current compilation of information about state rules is found in the 1981 edition of Andrews, *op. cit.* This shows that seven of the states listed by appellees now follow

The appellant, moreover, is not charged with making self-laudatory statements, which are expressly forbidden by DR2-101-(A). Had appropriate charges been filed there could be a trial on the facts and the law, and perhaps a test as to the constitutional validity of a prohibition on self-laudatory statements, or as to whether that term is sufficiently definite. In this case, however, the mere listing of "courts" is charged as a violation.

The appellees' attempt to support a general prohibitory rule by asserting that a particular item might be questioned runs afoul of the injunction of *Central Hudson* that restrictions on commercial speech must be "narrowly drawn," in terms of the specific evil apprehended.[12] The majority opinion there indicated that a narrowly drawn rule which forbad advertising tending to promote electricity consumption at peak hours might pass constitutional scrutiny. The Court nevertheless invalidated the rule before it in the particular case on the ground that it went beyond the necessities of the situation. If the appellees approach were accepted then a state could adopt the broadest possible regulatory rule and could then quibble about any detail of an advertisement which might be displeasing to the regulatory authorities. This form of regulation is clearly foreclosed by Central Hudson.

Appellees try to support the total ban on the listing of courts by arguing, first, that other states have similar rules[13] and, second, that the distinguished lawyers who drafted the Missouri rule "did not see fit to approve the listing of courts such as

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ABA Proposal B, which specifies what is forbidden in advertising rather than that which is permitted. Andrews, *op. cit.*, pp. 117ff, 136-46. Nine others follow Proposal A which, in its initial form, expressly permits the listing of courts of admission. *Ibid.*, pp. 117ff, 136-46. We are aware of no rule which specifically prohibits the listing of courts of admission.

[12] Note 3, *supra.*

[13] But see Note 11, *supra.*

other states permit." (p. 10). We will not repeat the arguments in our main brief as to why listing of courts would be helpful to the public, especially in a bi-state telephone directory, but will add the additional observation that the Missouri rule would prevent a lawyer from, advertising the fact that he is admitted to practice in the local United States District Court. Such information might be very helpful to a person who had a potential claim under a federal statute such as the Age Discrimination in Employment Act, 29 USC Sec. 621-634; the statute protecting against false odometer readings, 15 USC. Sec. 1891; or the Fair Credit Reporting Act, 15 USC Sec. 1681. Potential claimants might have no acquaintanceship with any lawyer, and might want to know who would be available to serve them.

VIII.

Restrictions On Mailed Advertisements Cannot Be Justified On The Basis Of The "Privacy" Interest.

Appellees, in support of the general prohibition on mailed advertising, refer only to the "privacy" interest, and cite *Ohralik* in support. That case did not in any sense turn on privacy concepts. The word "privacy" appears in the opinion only once, at page 461, in a summary of the arguments made in the American Bar Association's amicus brief. The Court, in the next paragraph, said that it did not have to pursue analysis along the lines suggested by A.B.A. The Ohralik holding was based on the potential for overreaching, as more fully discussed in Point II above.

The assumed privacy interest of members of the public is a dubious justification for a general restriction on First Amendment rights. In *Cohen* v. *California,* 403 U.S. 15, 21 (1971), the Court required a "showing that substantial privacy interests are being invaded in an essentially intolerable manner" to justify restriction on otherwise protected speech.

This is especially so when the mails are involved. The Court's latest word is found in *Consolidated Edison Company* v. *Public Service Commission,* 447 U.S. 530, 541, 543 (1980), in which it is said that "all persons are free to send correspondence to private homes through the mails ..." and that householders are amply protected by their power to ignore or discard undesired advertisements.

The footnote appellees rely on from *Koffler* v. *Joint Bar Association,* 420 NYS 2d. 560, (App. Div., 1979), reversed 412 NE 2d. 977 (1980), cert. den. U.S. (1981), strikes us as the ultimate in fantasy. We never though that we might frighten addressees by using office stationery for personal or political correspondence. In the present case, moreover, the appellant's announcements were mailed in a plain envelope (A-25, Stip. Exh. 11), such as is usal for announcement cards. The Appellate Division, furthermore, based its conclusion on a finding that there was solicitation, and would have permitted the mailing of a mere advertisement. Appellees admit that the mailing of the appellant's announcements did not constitute solicitation.

We have yet to see a post-*Bates* rationalization for the addressee limitations of DR 2-102(A)(2), which apparently has not been amended in Missouri and elsewhere in the light of *Bates.*[14] Absent such justification, the rule manifestly must fall under the weight of Central Hudson.

IX.

Rules Of Other Jurisdictions Do Not Supply Substantial Constitutional Authority For The Challenged Rules.

Appellees inaccurately characterize our contention as being that no rule regulating legal advertising would be valid, other than a rule "proscribing only that which is false, misleading, or

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[14] Another case holding that a prohibition on mailed advertising is unconstitutional is Bishop v. The Committee on Professional Ethics, F. Supp. , (D.C.N.D. Iowa, Case #81-47, August 20, 1981.)

self-laudatory," (p. 3.) At page 11 it is said that if *Bates* stands for the proposition that a lawyer may advertising anything which is "truthful, not misleading, or self-laudatory," then "the Bates case has been misconstrued by virtually every State Supreme Court in the nation." In so arguing they misunderstand our argument and do not correctly reflect the state rules.

What we do contend is that lawyers' advertising which is truthful, factual and not misleading constitutes protected speech under the First Amendment. As such it may be restricted only for a substantial reason and, even then, only by the least restrictive means adequate to the end. The burden of justifying the regulation is on the regulator. We would not argue that everything which is truthful may be advertised. State authorities well might believe that lawyers should not advertise the size of verdicts obtained or the number of acquittals secured. A specific rule against the advertising of "results" would be methodologically proper under *Central Hudson,* since it is narrowly drawn to meet an apprehended evil. Missouri's rules are not so limited.

As for the state of legal authority, judicial rule making is not litigation through the adversary process and does not give rise to precedent. We are aware of no articulated justification for a rule on the Missouri model, with analysis in terms of *Bates* and other controlling authorities. The cases which have come into litigation support our position overwhelmingly.[13]

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[13] To the cases cited on page 21 and in footnote 11 of our main brief should be added Foley v. Alabama State Bar, 648 F. 2d. 355, (5th Cir., 1981) and Bishop v. Committee on Professional Ethics, Note 14, *supra.* Appellees' cited case of Carter v. Lovett and Linder, Ltd., 425 A. 2d. 1244, (R.I., 1981), is contrary to our position in holding that a rule permitting advertising in the "Yellow Pages" requires that the pages be yellow and forbids advertising on the inside back cover of a telephone directory, but this strange holding was expressly disapproved in Lovett and Linder, Inc. v. Carter, (D.C.R.I.,) Note 5 *supra.*

We again question the accuracy of appellees' tabulation of of state rules on pages 9 and 10 of their brief. Twenty states have adopted American Bar Association Proposal B, or a rule on that model.[16] This form of rule does not list that which is permissible, so as to preclude everything else. There is no consensus along the lines that appellees argue.

Many states, furthermore, have taken a patently evasive approach to the problems of legal advertising. Lori B. Andrews of the American Bar Foundation, in her systematic study of legal advertising following Bates, observes as to some state rules as follows:[17]

> "...many of these rules restrict attorneys from advertising the type of information that would be most useful in helping the average citizen decide whether his problem required legal services and who best could provide those services. ... *The restrictive view of the state rules is heightened by the fact that the very ad in Bates would not be permissible in 27 states and under the ABA Model Code.*" (Emphasis supplied.)

Professor Lawrence K. Hellman, in an article analyzing the Oklahoma post-*Bates* rules, which are similar to Missouri's in some respects, comments as follows:[18]

> "Some proposed responses to Bates seem designed more to thwart advertising by lawyers rather than to permit it."

The state rules, then, simply do not provide substantial constitutional authority.

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[16] Note 11, *supra.*

[17] Andrews, *op. cit.*, p. 43

[18] Hellman, "The Oklahoma Supreme Court's New Rules on Lawyer Advertising: Some Practical Legal and Policy Questions," 31 Okla. L. Rev. 509 (1978).

The American Bar Association has apparently rethought its position. Its latest proposal for a Model Code abandons the notion of prescribing the only permitted content of legal advertisements and prohibiting anything else, with a comment as follows:[19]

> "Attempt at such specification assumes that the bar can identify information that the public might think relevant. The code list has been criticized as unnecessarily restrictive."

Authentic constitutional guidance must be found in this Court's decisions and not in the state rules. The Missouri approach deprives the public of useful information, and is not necessary to protect the public. Effective regulation can be had through the use of narrowly drawn rules along the lines suggested in Part IV of the *Bates* opinion, and followed in many states.[20]

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[19] Proposed Final Draft, Model Rules of Professional Conduct, American Bar Association Commission on Professional Standards, May 30, 1981, p. 188; *Ibid.*, Alternate Draft, p. 27. See 67 *American Bar Association Journal*, pp. 1117-1118. (Sept., 1981).

[20] Andrews, *op. cit.*, lists 20 states which have adopted ABA Proposal B, at pp. 136-146. See Note 11, *supra.*

CONCLUSION

The judgment should be reversed. Costs should be assessed against the appellees.

Respectfully submitted,

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